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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JOSEPH MONTECALVO, Defendant and Appellant.	G052019 (Super. Ct. No. 12CF2908) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Gassia Apkarian, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Michael Joseph Montecalvo sought redesignation of his felony convictions for violating Penal Code section 459 as misdemeanors. (All further statutory references are to the Penal Code.) The trial court denied his request, and defendant appeals.

We affirm. Section 459 is not listed as one of the felony convictions for which redesignation and resentencing may be sought. Further, defendant is not similarly situated with persons convicted of violating section 487, subdivision (d)(1), so his equal protection argument fails.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant pled guilty to two counts of second degree vehicle burglary, in violation of sections 459 and 460, subdivision (b). He was placed on three years' formal probation and ordered to serve 90 days in jail, with 24 days' credit.

Defendant filed a petition for redesignation of his felony convictions, pursuant to section 1170.18, subdivision (f). Following a hearing, the trial court denied defendant's petition without prejudice.

DISCUSSION

In 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18), which makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089, 1091.) Those offenses previously had been designated either as felonies, or as crimes that can be punished as felonies or misdemeanors. (*Id.* at p. 1091.) Proposition 47 added, among other things, sections 490.2 and 1170.18 to the Penal Code. (*People v. Rivera, supra,* at pp. 1091-1092.) Section 490.2, subdivision (a) provides that "obtaining any property by theft" constitutes

a misdemeanor where the value of the property taken does not exceed $950. (See *People v. Acosta* (2015) 242 Cal.App.4th 521, 525.)

Defendant was convicted of vehicle burglary in violation of section 459. Section 459 is not included in section 1170.18, subdivision (a)'s list of statutes defining felony offenses that qualify for redesignation as misdemeanors under Proposition 47.

Defendant nevertheless argues his convictions for vehicle burglary qualify as theft-related offenses within the meaning of section 490.2 and therefore are eligible for redesignation. Section 490.2, subdivision (a) provides in relevant part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor."

Defendant was not charged with theft of any degree, but with vehicle burglary. The appellate court in *People v. Acosta*, *supra*, 242 Cal.App.4th at page 526, rejected the same argument advanced in this case by defendant, and pointed out that "theft is not an element of the offense" of vehicle burglary. Section 459 defines vehicle burglary as the entering into a "vehicle as defined by the Vehicle Code, when the doors are locked . . . with intent to commit grand or petit larceny or any felony." The court in *People v. Acosta, supra,* 242 Cal.App.4th at page 526, explained: "'[T]he crime of burglary can be committed without an actual taking, as opposed to the crimes of theft, robbery, and carjacking.' [Citation.] '[C]arjacking, like theft and robbery, *and unlike burglary*, is a crime centered on the felonious taking of property.' [Citation.] [The defendant]'s comparison of burglary of a motor vehicle to theft offenses fails. [¶] Because nothing in the language of Proposition 47 suggests it applies to [vehicle burglary], there is no merit to his argument that reclassifying his offense as a misdemeanor is required in order to comply with the express intent of liberal construction of Proposition 47."

We agree with the analysis of *People v. Acosta* and similarly hold that Proposition 47 does not apply to vehicle burglary in violation of section 459.

Defendant likens his crime to shoplifting (§ 459.5), which was added by Proposition 47, and which provides that "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars[,] . . . shall be punished as a misdemeanor." (§ 459.5.) Because defendant entered two locked cars with the intent to commit larceny of car stereos with a total value under $950, he argues that we should interpret vehicle burglary as coming within Proposition 47. Defendant is wrong for at least two reasons. First, if the Legislature had intended to include vehicle burglary within the resentencing rules of Proposition 47, it could easily have amended section 459, referenced section 459 in sections 490.2 and 1170.18, or added a new statute like section 459.5, which would have differentiated vehicle burglary with the intent to steal a stereo or other personal property from vehicle burglary with the intent to steal the vehicle or commit another more serious felony. The Legislature took none of those actions, and we cannot write into the existing statute words that the Legislature omitted.

Second, the addition of section 459.5 leaves in place the felony status of commercial burglary, other than the narrow exception created by section 459.5. The Legislature recognized and reinforced the inherent danger of burglary. Indeed, the addition of section 459.5 regarding shoplifting an item or items of small value from a commercial establishment, while not making similar changes to the taking of items of small value from a vehicle leads us to conclude that the crime of vehicle burglary must not be treated as a theft-related offense under Proposition 47.[1]

[1] At the hearing on defendant's petition for redesignation, the prosecutor conceded that the amount of personal property taken by defendant from the two vehicles

Defendant also argues that the equal protection clause of the Fourteenth Amendment to the United States Constitution requires application of sections 490.2 and 1170.18 to a conviction for vehicle burglary. Defendant contends that because a defendant convicted of stealing a vehicle under section 487, subdivision (d)(1) would be eligible for resentencing, a defendant convicted of entering a vehicle to commit larceny should similarly be eligible for resentencing.

"'"The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a similar fashion. [Citations.]" [Citation.] We first ask whether the two classes are similarly situated with respect to the purpose of the law in question, but are treated differently. [Citation.] If groups are similarly situated but treated differently, the state must then provide a rational justification for the disparity. [Citation.]'" (*People v. Noyan* (2014) 232 Cal.App.4th 657, 666.) '"'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.]' [Citation.] This concept '"'compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" [Citation.]'" (*Ibid.*)

Here, defendant is not similarly situated to a person convicted of stealing a vehicle. He was convicted of vehicle burglary which, as discussed *ante*, does not include theft as an element. Vehicle burglary in violation of section 459 involves entering a locked vehicle with the intent to steal or commit a felony therein. We therefore reject defendant's equal protection challenge.

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was less than $950. The records of defendant's initial plea bargain do not indicate he actually took anything from the vehicles, much less what the value was.

DISPOSITION

The postjudgment order is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.